Effective: January 7, 2008

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure
Part I. Crimes
Chapter 63. Mail Fraud and Other Fraud Offenses

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms

are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure
Part I. Crimes
Chapter 63. Mail Fraud and Other Fraud Offenses

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure
Part I. Crimes
Chapter 96. Racketeer Influenced and Corrupt Organizations

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section

1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons).,[1] section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money

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[1] So in original.

transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United

States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or

political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department

or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or

maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l)

that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for

not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the

property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b),

the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the

property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and crossexamine witnesses who appear at the

hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of

forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise,

making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in

the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be

furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a

reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under

regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his

predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify

each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

United States' Final Proposed Conclusions of Law (Vol. One) at 12-21 (July 1, 2004).

* * * * *

5. Corporate Scienter May Be Established By The Collective Knowledge of The Corporation's Employees and Representatives

Insofar as a principal can be attributed with the knowledge of a single agent or employee, *see supra* Section I.A.4, a corporation, as a collection of employees and agents, "is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly." *United States v. T.I.M.E.-D.C. Inc.*, 381 F. Supp. 730, 738-39 (W.D. Va. 1974). Therefore, Defendants are liable for the aggregate knowledge of all employees and agents within (and acting on behalf of) the corporation, and cannot "plead ignorance" by claiming that the representative making the fraudulent statement, or obtaining the knowledge of its falsity, somehow was insulated from the rest of the corporation.

The seminal case on the "collective knowledge" doctrine is *United States v. Bank of New England, N.A.*, 821 F.2d 844 (1st Cir. 1987). In that case, the bank was convicted of violating the Currency Transaction Reporting Act for failing to report various financial transactions. At trial, the district court stressed that, unlike a natural person, the jury must consider the bank "as an institution." The trial court instructed the jury as follows:

> In addition, however, you have to look at the bank as an institution. As such, its knowledge is the

> sum of the knowledge of all the employees. That is, the **bank's knowledge is the totality of what all of the employees know within the scope of their employment.** So, if Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all. So if you find that an employee within the scope of his employment knew that CTRs had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed.

Id. (emphasis added). After conviction, the bank on appeal challenged the trial court's instructions regarding the bank's knowledge and intent, by allowing the jury to consider the aggregate knowledge of various employees, including the tellers at the bank window (who participated in the withdrawals) and the other employees (who might not have even known of the withdrawals). The individual making the withdrawals was acquitted on all counts, and none of the bank employees had been charged with a crime. *Id.* at 846. Therefore, the bank contended, "it is error to find that a corporation possesses a particular item of knowledge if one part of the corporation has half the information making up the item, and another part of the entity has the other half." *Id.* at 856.

The First Circuit rejected the bank's argument, noting that "[a] collective knowledge instruction is entirely appropriate in the context of corporate

criminal liability. . . . [T]he knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation." *Id.* at 856. In addition, the court stressed that it would be unjust to allow a corporation to avoid liability merely because it chose to divide its knowledge, thus allowing it to "plead ignorance":

> Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of these components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation . . . . Since the Bank had the compartmentalized structure common to all large corporations, the court's collective knowledge instruction was not only proper but necessary.

Id. at 856.

Earlier cases also demonstrate that corporate knowledge should be aggregated, and accordingly notice and knowledge of a fact by an employee-representative is imputed to the corporation-principal. For instance, in *Inland Freight Lines v. United States*, 191 F.2d 313, 315 (10th Cir. 1951), the court ruled that a corporation could be held responsible for the mistakes and falsification by its drivers in preparation of drivers' logs even where no individual agent or employee was shown to have actual knowledge of discrepancies between the business logs and reports. The court explained:

> The logs and the reports did not find their way into the hands of a single agent or representative of the

> company after they were filed. No single agent or representative in the offices of the company had actual knowledge of their conflicts and falsities. But one agent or representative had knowledge of the material contents of the logs and another had knowledge of the material contents of the reports. And the knowledge of both agents or representatives was attributed to the company.

Id. at 315.[11]

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[11] *See also Matter of Pubs., Inc.*, 618 F.2d 432, 438 (7th Cir. 1980) (collective knowledge of all employees and departments within the corporation is generally imputed to the corporation); *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 721-22 (5th Cir. 1963) ("It is now beyond doubt that a corporation may be held criminally liable. [citing cases] These cases also settle the proposition that knowledge of employees and agents of the corporation is attributable to the corporation, and that their acts may amount to wilfulness on the part of the corporation."); *United States v. U.S. Cartridge Co.*, 198 F.2d 456, 464 (8th Cir. 1952) (collective knowledge doctrine case in False Claims Act context); *Camacho v. Bowling*, 562 F. Supp. 1012, 1025 (N.D. Ill. 1983) ("Other organizations, such as private corporations or partnerships, are held to have constructive notice of the collective knowledge of all the employees and departments within the organization."); *People v. American Medical Centers*, 324 N.W.2d 782, 793 (Mich. App. 1982) ("The combined knowledge of those employees may be imputed to the corporation to find it liable for fraudulent acts."); *United States v. Sawyer Transport Inc.*, 337 F. Supp. 29, 31 (D. Minn. 1971), *aff'd*, 463 F.2d 175 (8th Cir. 1972) (knowledge of employees may be joined and imputed to the corporation); *United States v. E. Brooke Matlack*, 149 F. Supp. 814, 819-20 (D. Md. 1957) (corporation liable for knowingly and wilfully violating ICC regulations even where main office in Philadelphia did not know or suspect that branch agents in Baltimore were violating duties); *General City Motors Inc. v. Minton*, 137 S.E.2d 522, 525 (Ga. App. 1964) (corporation "chargeable with the composite

Likewise, since *Bank of New England*, several other courts have allowed such agents' knowledge to be aggregated and imputed to the corporation as a whole. For instance, in *United States v. Sun-Diamond Growers*, 964 F. Supp. 486 (D.D.C. 1997), the court noted that the defendant "makes much of the fact that purportedly no other corporate officials knew about Mr. Douglas' activities. However, knowledge obtained by a corporate agent acting within the scope of his employment is imputed to the corporation." *Id.* at 491 n.10. In addition, the Court noted that, under agency principles, the defendant could still be liable for Douglas' actions "even if Mr. Douglas had acted against corporate policy or the corporation's express instructions or even if Sun-Diamond had derived no benefit from Mr. Douglas' actions." *Id.*

In *CPC Intern., Inc. v. Aerojet-General Corp.*, 825 F. Supp. 795 (W.D. Mich. 1993), the court stressed that "a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee." 825 F. Supp at 811-812 (quoting *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W.2d 392, 400-401 (Mich. 1991) (in turn quoting *T.I.M.E.-D.C. Inc.*, 381 F. Supp. at 738); *United States v. LBS Bank-New York Inc.*, 757 F. Supp. 496, 501 (E.D. Pa. 1990) (knowledge from different employees can be joined in order to establish corporate knowledge, but specific intent cannot be so aggregated); *United States v.*

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knowledge of acquired by its officers and agents" (emphasis added)).

Farm & Home Sav. Ass'n, 932 F.2d 1256, 1259 (8th Cir. 1991) (imputing collective knowledge of employees participating in multiple illegal transactions to employer).

Thus, under the collective knowledge doctrine "[t]he knowledge necessary to adversely affect the corporation does not have to be possessed by a single corporate agent; **the cumulative knowledge of several agents** can be imputed to the corporation." William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations*, § 790, at 16 (perm. Ed.) (emphasis added); accord William E. Knepper & Dan A. Bailey, *Liability of Corporate Directors and Officers*, § 1.02, at 4 (Supp. 1992).

Imposing the collective scienter upon the corporation follows equity as well as the extensive legal authority cited above. As the First Circuit noted in *Bank of New England*, the collective knowledge doctrine prevents a corporation from "plead[ing] innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import." 821 F.2d at 856 (citing *T.I.M.E.-D.C.*, 381 F. Supp. at 738). Indeed, numerous courts have prevented corporations (and other organizations) from taking advantage of their corporate form by attempting to "ostrich" themselves away from liability by insulating the actors (or spokespersons) of a corporation from those within the organization who have certain information.

In the words of Dan Webb, a former United States Attorney (and now lead trial counsel for Defendant Philip Morris):

> Given the often complex and decentralized nature of many corporations, it is sometimes difficult, if not impossible, to prove that any single corporate agents acted with the necessary intent and knowledge to commit an offense. Under the judicially created "collective knowledge" doctrine, however, this will not preclude a corporation's conviction. That doctrine deems a corporation's knowledge to be the combined knowledge and intent of all its employees. Thus, even if no single employee has the intent and knowledge necessary to commit a crime, the corporation can be convicted on the basis of its employees [sic] collective knowledge and intent.

Dan K. Webb et al., *Understanding and Avoiding Corporate and Executive Criminal Liability*, 49 Bus. Law 617, 625 (1994).[12]

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[12] *See also* Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?*, 47 Rutgers L. Rev. 605, 625 (1995) (noting that corporations can be convicted of intent-based crimes even where none of their employees possessed the requisite intent); Kevin B. Huff, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 Colum. L. Rev. 1252, 1256 n.26 (1996) ("Under the 'collective knowledge' doctrine, courts have found the required intent by imputing to the corporation the aggregate knowledge of more than one employee."); *Steere Tank Lines v. United States*, 330 F.2d 719, 721 (5th Cir. 1963) ("knowledge of employees of the corporation is attributable to the corporation, and . . . their acts may amount to wilfulness on the part of the corporation").

See also Fletcher, *Corporations*, § 790 (absent collective knowledge doctrine, "corporations could avoid the adverse implications of the [imputed knowledge] rule by restricting the

Accordingly, under the foregoing authority, it is immaterial whether any single individual employed by Defendants knew both that cigarettes and exposure to secondhand smoke caused disease and that the corporation was making public statements to the contrary. For example, it is immaterial whether, on January 11, 1990, when R.J. Reynolds Public Relations Manager Jo Spach sent a letter to Willow Ridge School, and informing the school (and asking that her information be passed along to students) that scientists did not know the causes of chronic diseases reported to be associated with smoking, Ms. Spach herself knew that R.J. Reynolds research department had longstanding proof of the causal connection between smoking and disease. *See* Racketeering Act #85. Similarly, for purposes of

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intracorporate flow of information."). As noted by the Fifth Circuit in *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1376 (5th Cir. 1983), "Because a corporation operates through individuals, the privity and knowledge of individuals at a certain level of responsibility must be deemed privity and knowledge of the organization, 'else it could always limit its liability.'" (citing *Coryell v. Phipps*, 317 U.S. 406, 410-11 (1943)); *Silver Line, Ltd. v. United States*, 94 F.2d 776, 780 (9th Cir. 1937) (ship owner may not escape liability by giving management functions to employee acting as agent)). As the Eleventh Circuit emphasized in *First Alabama Bank*, 899 F.2d 1045, 1060 n. 8 (11th Cir. 1990), the reason that courts impose constructive knowledge upon the principal "is to avoid the injustice which would result if the principal could have an agent conduct business for him and at the same time shield himself from the consequences which would ensue from knowledge of conditions or notice of the rights and interests of others had the principal transacted his own business in person."

Defendants' liability,[13] it is immaterial whether,

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[13] It is black letter law that a corporation may be prosecuted along with its agents for a violation of the law. *See, e.g., United States v. Richmond*, 700 F.2d 1183, 1195 n.7 (8th Cir. 1983) (corporation may be prosecuted along with its officers for violations of 18 U.S.C. § 1001, the false statements statute) (citing cases). *See also United States v. Basic Constr. Co.*, 711 F.2d 570, 572-73 (4th Cir. 1983) (corporation can be held criminally liable for antitrust violation of employees, even if such acts were against corporate policy or express instructions); *United States v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000,1004 (9th Cir. 1972) (corporate liability even if employee's acts were contrary to instructions or policies); Beusch, 596 F.2d at 877; *Harry L. Young & Sons, Inc.*, 464 F.2d at 1297; *Automated Medical Labs*, 770 F.2d at 406-07 & n.5; *Egan*, 137 F.2d at 379; *United States v. Cincotta*, 689 F.2d 238 (1st Cir. 1982) (§ 1001 false statements case).

At the same time, the corporation may be convicted of a willful violation even where the employees are acquitted. For instance, in *Bank of New England*, the bank employees who participated in the transactions (and whose collective knowledge was imputed to the bank) were both acquitted of conspiracy and of aiding and abetting the substantive violations of the Currency Transaction Reporting Act. 821 F.2d at 847. Indeed, various other courts have upheld the vicarious liability of the corporation even where the employee or agent who allegedly acted on the corporation's behalf is acquitted. *See, e.g., LBS Bank-New York Inc.*, 757 F. Supp. 496; *United States v. Young Bros.*, Inc., 728 F.2d 682 (5th Cir. 1984); *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676 (5th Cir. 1981); *Dugan Drug Stores Inc. v. United States*, 326 F.2d 835 (5th Cir. 1964); *United States v. American Stevedores, Inc.*, 310 F.2d 47, 48-49 (2d Cir. 1962); *Magnolia Motor & Logging Co. v. United States*, 264 F.2d 950 (1959); *American Medical Ass'n v. United States*, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943); *United States v. General Motors Corp.*, 121 F.2d 376, 411 (7th Cir. 1941) ("we believe that the acquittal of the officers and agents, even if they had been the only persons through whom the

when Philip Morris CEO Joseph Cullman denied that cigarette smoking is hazardous or that smoking poses a hazard to pregnant women or infants, Cullman personally knew the contrary. *See* Racketeering Act #105. And, when the Chief Executive Officers of Defendants testified in 1994 before a congressional subcommittee (which testimony was televised), and denied that nicotine was addictive or that the companies manipulated the amount of nicotine contained in their cigarettes, it is immaterial whether each of the CEOs were personally aware of the extensive information in their companies' files that these public statements were counterfactual.

For example, in *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448 (9th Cir. 1986), an accounting firm was convicted for making and subscribing false tax returns, in violation of 26 U.S.C. § 7206(1), for preparing and submitting tax returns claiming deductions for illegal "straddle" investments. The firm's chief operating officer, Ashida, advised the customer about the investment, and provided information to another employee of the firm, Whatley, for the actual preparation of the customer's return. *Id.* at 1450-51. At trial, the firm contended that a corporation cannot be guilty of a § 7206 offense "when the person who actually subscribes the false return believes it to be true and

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corporations could have acted, should not operate without more to set aside the verdict against the corporation."); *Hilton Hotels Corp.*, 467 F.2d at 1008 (citing cases); *United States v. Austin-Bagley Corp.*, 31 F.2d 229 (2d Cir. 1929); *American Socialist Society v. United States*, 266 F. 212 (2d Cir. 1920).

correct." *Id.* The district court denied the motion, and the jury ultimately convicted the firm.

On appeal, the defendant claimed that six of the convictions should be overturned because there was no evidence that Whatley, the preparer and subscriber of these six tax returns, possessed the requite intent to wilfully make and subscribe a false tax return. The firm conceded that "Ashida, who supplied Whatley with all of his information regarding the straddle losses, did have the requisite intent," but pointed out that Ashida did not physically subscribe to the return. After considering the argument, the court of appeals concluded that it was "completely meritless":

> If it were accepted by the courts, any tax return preparer could escape prosecution for perjury by arranging for an innocent employee to complete the proscribed act of subscribing a false return. This interpretation of section 7206(1) defies logic and has no support in the case law. A corporation will be held liable under section 7206(1) when its agent deliberately causes it to make and subscribe to a false income tax return.

Id. at 1454. In so concluding, the court precluded the organization from shielding itself from liability by artificially dividing its responsibilities – and its knowledge. As the court explained in *T.I.M.E.-D.C.*, 381 F. Supp. at 738-39, "a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import." *See also United States v. Sawyer Transport, Inc.*, 337 F. Supp. 29 (D. Minn. 1971), *aff'd*, 463 F.2d 175 (8th Cir. 1972).

Similarly in *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 919 (4th Cir. 2003), a False Claims Act case, though not formally needing to reach the "corporate scienter" rule, the court of appeals declined to adopt the defendant's proposed "single actor" requirement that the same employee know both the certifying requirement and the wrongful conduct. Under that rule, the court reasoned, "corporations would establish segregated 'certifying' offices that did nothing more than execute government contract certifications, thereby immunizing themselves against FCA liability." *Id.* As acknowledged by the California Supreme Court, the single actor rule is "fraught with danger and opens up avenues of fraud which would lead to incalculable hazards. It would permit a corporation, by not letting its right hand know what is in its left hand, to mislead and deceive . . . . ." *Sanders v. Magill*, 70 P.2d 159, 163 (Cal. 1937).

For the foregoing reasons, Defendants in this case cannot escape their liability by insisting that a "single actor" must complete every step of the unlawful transaction, despite the fact that the corporation, in performing its various tasks, relies upon the concerted efforts – and collective knowledge – of various persons, departments, and other agents to function. Such a result would not only be contrary to extensive legal precedent, but inequitable, especially since "the principal cannot claim the fruits of the agent's acts and still repudiate what the agent knew." *Eitel v. Schmidlapp*, 459 F.2d 609, 614 (4th Cir. 1974) (citing *Curtis, Collins & Holbrook Co. v. United States*, 262 U.S. 215, 223-24 (1923), and other cases). Therefore, Defendants are

accountable for the collective knowledge of their employees and agents.

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Transcript of Trial Record at 38:16-39:12 (argument of counsel for Government) (Sept. 21, 2004).

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In addition to describing what the United States will do, it's important to briefly outline how we are going to prove the defendants' knowing misconduct.

Every defendant in this case is a corporate entity. As Your Honor knows, a corporate entity is not like a natural living person. A natural living person's intent and knowledge, unlike a corporation, can often be determined from the words and actions of that single natural person alone. A corporation by contrast is a collective entity.

Therefore, the law recognizes that a plaintiff may prove a corporation's knowledge and intent through the combined words and actions of the corporation officers, employees, agents and representatives.

Therefore, our proof will not focus on whether, if we are looking at a particular statement which we are alleging to be falsely and knowingly made, we are not going to focus on evidence that that particular representative knew or believed the statement to be false because that's immaterial. Rather, the government's proof will rest on the collective knowledge of the defendants' corporations' officers, employees, agents and representatives. In short, our proof will rest on the totality of the evidence.

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Transcript of Trial Record at 4521:13-4524:14 (testimony of Dr. Neal Benowitz (Nov. 1, 2004).

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Q: Now, is it fair to say that the whole theory behind low-tar cigarettes begins with the recognition of a dose/response relationship?

A: Yes.

Q: And the dose/response relationship insofar as cigarette tar is concerned was first explored by Dr. Wynder's mouse skin painting studies back in the 1950s?

A: Yes.

Q: And Dr. Wynder was one of the pioneers of smoking and health research; correct?

A: Yes.

Q: And Dr. Wynder's studies were thought to establish that the higher the level of tar, the more likely it is that smokers will get lung cancer; correct?

A: Yes.

Q: And based on the animal dose/response data it was thought that lower tar meant less cancer; correct?

A: If there was lower tar exposure, yes, that was the hope.

Q: And, in fact, Dr. Wynder published an article in a journal called Cancer back in 1957; right?

A: Well, I'm sure he probably did. I don't know offhand the article, but I will certainly take your word for it.

Q: No, I don't want you to take my word. Let's call up tab 529. JD 003726.

Dr. Benowitz, my associate just handed you a copy of the article. And on the screen is a copy of the front page of the journal called Cancer, which is a journal sponsored by the American Cancer Society; correct?

A: Yes.

Q: And the journal displayed on the screen is dated 1957; correct?

A: Yes.

Q: Let's look at page 1204 of that journal.

MR. WELLS:

Could I go back and see the first page of Dr. Wynder's article?

Q: So we see that the article in the 1957 Journal is written by Ernest L. Wynder and Joanne Mann; correct?

A: Ernst is really his name, actually.

Q: I'm sorry, sir?

A: I think his name is Ernst. I think it's actually spelled wrong, but yes, that's what it says.

Q: And the article is titled: A Study of Tobacco Carcinogenist, III, filtered cigarettes; correct?

A: Yes.

Q: Now could we go to page 1204.

And at page 1204 Dr. Wynder writes, "It is feasible to produce filter tips that will allow the cigarette a satisfactory pressure drop and satisfactory flavor and, at the same time, remove about 40 percent of the tar of the cigarette smoke. Such a filter incorporated into a regularly-sized cigarette, which normally yields 30 milligrams of tar

in its smoke, can reduce the tar exposure of an individual smoking this cigarette to about 18 milligrams. A reduction to such level, as both animal experiments and human statistical studies show, will be followed by a significant reduction in cancer risk, provided the number of cigarettes smoked is kept constant."

Now, the reference to animal experiments, that reference was to the mouse skin painting studies that Dr. Wydner had performed?

A: Yes.

Q: And the human statistical studies, did that relate to various epidemiological studies that had been done?

A: I don't know which studies he was referring to at this point in time, but studies have been done at some point in time to look at that question.

Q: Okay. So it's clear that at least in 1957 Dr. Wynder has called for reductions in tar as a means of reducing the risk of cancer; correct?

A: Yes.

Q: And it is your position that from the 1950s until today, that it was reasonable and valid for persons to believe that , all things being equal, if you lowered tar levels you would reduce the cancer rate; correct?

A: Yes.

* * * * *

Written Direct Examination of David E. Townsend at 80:1-18 (Feb. 22, 2005).

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To be clear, in this written testimony, unless stated otherwise, any reference I make to smoke yields should be interpreted to mean those yields as measured by the Federal Trade Commission standardized method, or, for the time period prior to 1967, other comparable methods.

Q. Dr. Townsend, there has been much testimony in this case regarding what are called "low tar" and "lower tar" cigarettes. Is it the general reduction approach that led to the development of "low tar" and "lower tar" cigarettes?

A. Yes.

Q. Before getting to the particular techniques employed to achieve general reduction, I want to ask you to provide the Court with some background information. First, what is the theory behind general reduction as a potential means to reduce the health risks of smoking?

A. One of the basic tenets of toxicology is that "less ought to be better." Since the 1950s, the epidemiology has suggested a dose response relationship between smoking and the risk of disease. Put another way, the more smoke one is exposed to, the greater the risk of contracting a disease associated with smoking. The theory behind general reduction is that if the smoke yield is reduced. a smoker's exposure to smoke will be reduced, and there will be a decrease in risk. In other words, "less ought to be better."

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Written Direct Examination of W. Kip Viscusi at 32 (Mar. 28, 2005).

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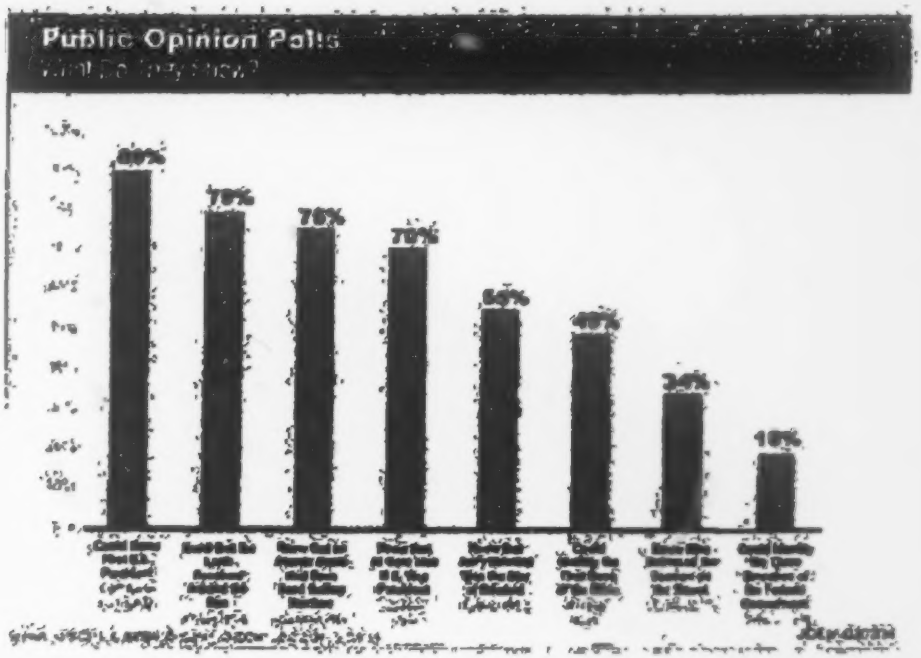

Q: How do the results of these other polls help us to understand the public's awareness of the health risks of smoking?

A: They provide a benchmark for us to gauge the public's awareness of the health risks of smoking. Compared to these benchmarks, the levels of smoking risk awareness are extraordinarily robust, and could properly be characterized as nearly universal. In fact, they probably represent practical maximum levels. The 1989 Surgeon General's Report (US Ex. 63621) suggests that it may be "unrealistic to set a goal above 90 percent of smokers for public knowledge," and I agree with that statement for several reasons. First, there is "noise" in virtually any survey created by unexplained or unexplainable

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patterns of response or coding errors. Second, as the Surgeon General noted, there may well be a small percentage of the public . . . .

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The George H. Gallop International Institute, *Teen-Age Attitudes & Behavior Concerning Tobacco: Report of the Findings* at 24-25 (Sept. 1992).

* * * * *

Awareness of Harmful Effects of Smoking

Nearly all teens and adults recognize that smoking can be harmful to their health.

Is Smoking Harmful to Health?		
	Yes	No
All teens	99%	1%
Teen smokers	96	4
Non-smokers	99	1
Adults	96	4

Teen smokers, particularly those who smoke heavily, are slightly less likely than non-smokers to believe that breathing smoke from other people's cigarettes is harmful to one's health.

Is Ambient Smoke Harmful?		
	Yes	No
All teens	96%	4%
Heavy smokers	90	10
Light smokers	96	4
Occasional smokers	94	6
Non-smokers	97	3

Teens are more likely than adults to believe that cigarette smoking is a cause of lung cancer, heart defects and birth defects. Indeed, teens are far more likely than adults, as measured by the Gallup Poll, to recognize that cigarette smoking can be a cause of birth defects, by a margin of 91 percent to 67 percent.

Knowledge of Cigarette Dangers		
	Teens	Adults
Cause of lung cancer	99%	94%
Cause of heart disease	88	85
Cause of birth defects	91	67

There is a slight tendency for teen smokers not to recognize the dangers of cigarettes as their volume of cigarette use increases. Whether this constitutes ignorance or denial is a matter of conjecture.

Awareness of Dangers by Teen Smokers			
	Heavy smokers	Light smokers	Occasional smokers
Cause of lung cancer	96%	96%	100%
Cause of heart disease	83	86	90
Cause of birth defects	84	89	94

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FTC, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act* at 14-15 (Dec. 31, 1970).

* * * * *

Thus the regulatory problem presented by these figures is that responsible medical opinion indicates that the reduction of tar and nicotine content in cigarette smoke decreases the hazard to the health of that element of the population which persists in smoking cigarettes, and the bulk of those varieties which are at the low end of the tar and nicotine scale are filter varieties. To promote the public interest, advertisers should not be discouraged from promoting those varieties which rank low in tar and nicotine. However, much of the advertising designed to allay fears of the health consequences of cigarette smoking during the past year by emphasizing the presence of a filter was directed toward claims other than a forthright disclosure of tar and nicotine content of the advertised brand in relation to the range of all available varieties. (The Commission hopes that the proposal to disclose tar and nicotine content in cigarette advertising made by eight manufacturers (Appendix C) when implemented will lead those smokers who are unable to kick the habit to greater interest in obtaining a low tar and nicotine cigarette, and resultant competition among the cigarette companies to meet that interest.)

* * * * *